E. R. Carpenter Co. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Case 9-CA-15650

March 8, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On September 30, 1981, Administrative Law Judge Wallace H. Nations issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent violated Section 8(a)(1) and (3) of the Act by failing to recall employee Linda Ward on June 12, 1980, because of her union activities. We find merit in Respondent's exception to this finding.

The facts, as more fully set forth by the Administrative Law Judge, are as follows. Linda Ward was hired by Respondent on September 13, 1976, and it is undisputed that she became one of the best employees in the automotive department. She also was a known, active participant in the organizing drive begun by the Union in September 1979. In April 1980, when Respondent laid off more than 100 of its approximately 400 employees, Ward chose to be laid off rather than bump onto another shift. Respondent issued its first recall of automotive department employees on June 12, 1980. At the hearing, Respondent's personnel manager, Buddy Angles, testified that he carried out the June 12 recall in accordance with the Company's established recall procedure, which involved telephoning employees on the layoff list in order of their seniority and job experience within the department. He further testified that, on the evening of June 12, he placed two telephone calls in succesession to Ward's home and, after receiving no answer, went on to the next senior person on the layoff list with the requisite job experience. Ward testified that, upon learning from other employees in June 1980 that a recall was likely, she instructed her two teenage daughters to make certain that one of them was always at home to answer the telephone. The daughters did not testify at the hearing. Ward eventually returned to work on December 4, 1980, during a later automotive department recall.

The Administrative Law Judge found that the General Counsel had made a *prima facie* showing that Ward's union activity was a motivating factor in Respondent's failure to recall her until December 1980. Noting that Ward's home was near the plant, that Ward's personnel file contained an alternate telephone number,[1] and that Ward, after receiving notice of an imminent recall, had taken precautions to insure that someone would always be at home to answer the telephone, the Administrative Law Judge found it "difficult to believe" that Respondent had made a genuine attempt to contact Ward on June 12. He further found that, in view of Respondent's opposition to unions, Ward's role as a leader in the recent unsuccessful organizing drive, and the fact that she was one of Respondent's best employees, the "only logical inference to be drawn" was that Respondent did not attempt to recall Ward in order of seniority. Finally, finding that Respondent's other plant procedures were better documented and detailed, he concluded that Respondent's recall procedure was "open to potential and in this case, actual abuse."

We do not agree with the Administrative Law Judge's finding that the facts compel an inference that Respondent did not attempt to recall Ward on June 12. It is undisputed that Respondent's recalls routinely are made in accordance with seniority and job experience within a department, and that the quality of an employee's past work performance has no bearing upon the order of recall. Additionally, two officials of Respondent testified without contradiction that it is company policy to notify employees of their recall by telephone and to attempt notification only once per recall, and that when an attempt to reach an employee is unsuccessful, the next senior employee on the layoff list with the requisite job experience is called. There is no evidence showing that Respondent, during the June 12 recall or any other recall, notified any employee of his recall other than by telephone, or that it looked for alternate telephone numbers when those on the layoff list were unavailable.[2] We also note that the layoff list used by Angles,[3] which was introduced by the General

[1] The record indicates that Ward's personnel file contained the telephone number of a neighbor, Jo Nell Clark. Ms. Clark testified that Respondent once called her home, asking for Ward, around the time Ward was first hired by Respondent.

[2] Accordingly, we find unpersuasive the Administrative Law Judge's suggestion that had Respondent genuinely attempted to contact Ward it could have sent an official to her home or examined her file for an alternative telephone number.

[3] We find no basis for the Administrative Law Judge's conclusion that Respondent's recall procedure was open to potential abuse merely because it was not as well documented as various other plant procedures that involved matters unrelated to layoffs and recalls.

Counsel, clearly supports Angles' testimony that he called Ward's home on June 12 and also that he otherwise followed the standard recall procedure.[4] Additionally, although Ward testified that she instructed her daughters to remain at home to answer the telephone whenever she and her husband were out, no evidence was presented establishing that the daughters were in fact home on the evening of June 12, and we find it significant that they were not called to testify at the hearing.[5] Finally, it is clear that Respondent contacted or attempted to contact other known union adherents for recall on June 12 and that there is no evidence that Respondent harbored animus generally against unionization or specifically towards Ward.

In view of all the foregoing, we conclude that the record is insufficient to support the Administrative Law Judge's inference that Respondent did not attempt to recall Ward on the evening of June 12, or his finding that the General Counsel has proved by a preponderance of the evidence that Respondent, in violation of the Act, delayed recalling Ward because of her union activities. We therefore shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint herein be, and it hereby is, dismissed in its entirety.

MEMBER FANNING, dissenting:

I would affirm the finding of the Administrative Law Judge that the delay in recalling employee Linda Ward from June 12, 1980, until December 4, 1980, was discriminatory, in violation of Section 8(a)(3) and (1) of the Act.

Ward, admittedly, was an excellent employee. She had been active in an unsuccessful union campaign in September 1979, which in fact was still going on without a petition being filed, as stated by Respondent's counsel. During the campaign, while still employed, she wore a union pin and T-shirt to work, handbilled, passed out leaflets, and procured signatures on authorization cards.[6]

My colleagues agree with Respondent's position that it is company policy to notify employees of recall by telephone and to attempt notification only once per recall. They see no basis for the Administrative Law Judge's conclusion that the recall procedure was open to potential abuse merely because it was not well documented as were various other plant procedures unrelated to layoffs and recalls. In this connection I would note that the Administrative Law Judge's Decision does not refer to testimony by Ward—not disputed—that she called Division Personnel Manager Angles on or about July 15 saying she understood that part of the first and second shifts were being recalled. Ward had worked on the first shift. He replied that it was a rush job and said he had tried to call her; that he would consider her for the next available job and she should call back in 2 weeks. She did so. He said the job situation was the same. She asked about a specific opening—the job of an employee who had gone to Procter & Gamble. Angles said that they were not going to post that job. It thus appears that Ward had made known to Angles her interest in being reemployed as soon as possible. Yet, with this background as an excellent production employee and marked interest in returning to work, a call was placed to her only on the evening of June 12.

At the end of direct examination of Angles, the Administrative Law Judge asked: Was there a reason for not recalling Ms. Ward in June 1980, other than the fact that she was not reached? To this Angles replied: "*We just could not reach her.* We did try then to recall her." (Emphasis supplied.)

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[4] It appears that the Administrative Law Judge, at least implicitly, discredited Angles' testimony that he attempted to reach Ward by telephone on the evening of June 12. In so doing, the Administrative Law Judge did not rely on demeanor but rather on his factual findings, which he concluded compelled the inference that Angles did not attempt to reach Ward. However, we note that the layoff list used by Angles, in corroboration of his testimony, bears a notation indicating that he telephoned Ward's home on the evening of June 12. Furthermore, as is clear from our Decision, the facts relied on by the Administrative Law Judge to draw the inference that Angles did not attempt to contact Ward do not compel such an inference.

[5] Although Ward was not specifically asked if she or her husband were at home that particular evening, it is implicit from the record that they were not.

[6] Ward testified that Supervisor Broyls, who did not testify, would come around every day and look at her shirt to see whether she was wearing the union pin; also that she got approximately 300 cards signed—in the breakroom, on the parking lot, at meetings, in employees' homes, and at her home where she held meetings, as well as at meetings in Bowling Green, where apparently the union office is located. Her handbilling occurred on the parking lot with supervisors present. After her layoff on April 11, she passed out leaflets on the road, principally in June, July, and August, 1980.

Respondent's attorney, Riemer, readily admitted that Respondent had a letter from the UAW notifying it that Ward was "head" of the organizing campaign within the plant, and that supervisors, foremen, and management were all aware of her union activity in November and December 1979, and at the time of her April 1980 layoff.

In addition, Riemer stipulated that employees who came back to work on June 12 had "both more and less seniority" than Ward, that this was true on November 10—when Ward had been off more than 6 months, thus relegated to a second recall list—and also on December 4 when Ward was recalled; also that "her employment record with the company is as fine as any employee's in the company and we have no quarrel with her work whatsoever. As an employee . . . ." At this point Riemer was interrupted by the attorney for the General Counsel saying: "We'll join the stipulation."

In its brief, p. 2, Respondent specifically states: "Ward is an excellent production employee with a fine production record."

On this record I would affirm the Administrative Law Judge. I fully agree with his finding that the recall procedure was potentially subject to abuse and was abused, and that "a connection between Ward's highly visible union activity and her delayed recall" must have been obvious to company workers and chilled future unionism. Ward should be made whole for the unlawful delay in her recall.

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), herein the Union, filed a charge against E. R. Carpenter, Co., herein Respondent, on August 4, 1980. A complaint issued on September 19, 1980, alleging that since on or about April 11, 1980, Respondent refused to recall from layoff an employee, Linda Ward, based on her seniority and has discharged employee Dianne Watkins in violation of the Act. Respondent in its answer denies these allegations. A hearing was held in Russellsville, Kentucky, on May 21, 1981, and briefs were received from both the General Counsel and Respondent on or about June 25, 1981.

Upon the entire record in this case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent operates a plant at Russellsville, Kentucky, manufacturing foam products for use in automobile and other products. Respondent admits that during the year preceding issuance of the complaint it had a requisite amount of interstate commerce, that it is an employer within the meaning of the Act, and that it is subject to the jurisdiction of the Board.

II. THE LABOR ORGANIZATION INVOLVED

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, referred to as the Union, is a labor organization within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Allegations Relating to the Recall of Linda Ward*

During the past 4 years there have been three major campaigns in which unions sought to organize Respondent's employees at its Russellsville, Kentucky, manufacturing plant. The most recent of these attempts was the UAW organizing drive which began in September 1979. Respondent was aware that Linda Ward was one of the most active employees in that campaign, handbilling employees, passing out leaflets, getting authorization cards signed, and wearing a union pin and T-shirt to work. Respondent admits full knowledge of Ward's prounion activities.

Ward began working for Respondent on September 13, 1976. In April 1980, the company had a large layoff, in which in excess of 25 percent of its work force (more than 100 employees) were laid off. The layoff resulted on April 7, 1980, in Linda Ward bumping Dianne Watkins, a lower seniority employee in the same department. Subsequently, on April 11, 1980, an additional layoff resulted in Ward accepting a voluntary layoff rather than bumping onto the second shift. After she heard from employees working in the plant, in June 1980, that a recall appeared likely, Ward informed members of her family that someone must always be at home to answer the telephone. Although she had arranged for someone to be at home and lived directly in front of the plant where it would have been easy to send word to her, she never received notice to report to work in June 1980. Respondent's personnel director, Buddy Angles, testified that he made two consecutive telephone calls to Ward within a few minutes of each other at approximately 8 p.m., on June 12, but received no answer. He did not explain why he did not attempt to reach her at an alternate number which she had left with the personnel department or by sending word to her home.

Ward was ultimately recalled by Respondent on December 4, 1980. With respect to the June 12, 1980, recall, employees both more senior and less senior than Ward were recalled. Respondent testified that its recall procedure involved telephoning employees on a need basis and in accordance with their seniority by department and jobs within that department in order to obtain employees to do available work. Angles testified that once not being able to contact an employee he would pass to the next senior employee and attempt to reach them by telephone in order to effect a recall. In August 1980, a letter was mailed to all employees, then on layoff, within the Russellsville, Kentucky, facility extending the period of time that they would be maintained on the layoff seniority list from 6 months to 1 year. The letter stated that a secondary list of employees with more than 6 months seniority, but less than 1 year seniority on layoff would be maintained and that subsequent to the recall of employees through the less than 6 months list that employees on the more than 6 months but less than 1 year list would be recalled to work by department and job experience. On November 10, 1980, a second recall in the automotive department occurred at which time Ward was not recalled as the recall did not exceed the less than 6 months employees on layoff. However, since a December 4 recall, Ward has been employed in the automotive department of the facility.

It is Respondent's contention that its procedures and policies utilized to effect recalls of employees on layoff during 1980 and prior years were maintained and adhered to in the strictest manner conceivable. Respondent noted examples of other known union adherents more senior than Ward who were not recalled in June 1980, because they were not reached pursuant to the company's procedures for recall. There is no allegation made that the layoff itself was in any way discriminatory.

Respondent contends that the General Counsel did not establish a *prima facie* case that protected conduct was a

motivating factor in Respondent's not having recalled Linda Ward earlier than December 4, 1980. I disagree. All parties agree that Ward is one of the best production employees in Respondent's Russellsville work force. It is difficult to believe that Respondent genuinely attempted to contact Ward and return this admittedly superior employee to work at the date of the first recall. Although her home was within sight of the plant, an alternate telephone number was available to Respondent, early warning of the possibility of recall had been given Ward, and precautions had been taken by her to insure that someone would answer her home phone, neither she nor anyone else was ever contacted to tell her to report to work at the June 12 recall date. Inasmuch as many employees did not have advance notice from friends in the plant of an imminent recall, I find it easy for Respondent to show some employees, some more senior than Ward and some less senior, could not be reached. However, they were not in the same position as Ward who had been placed on notice and was awaiting recall. Given the fact of Respondent's opposition to unions, the fact that a union organizing drive had failed within a period of time very shortly before the layoff, the fact that Ward was one of the leaders in the union movement at the plant, and the fact that Ward was one of the best employees in the plant, I find the only logical inference to be drawn is that Respondent did not make an attempt to recall Ward in order of seniority. All of Respondent's other plant procedures regarding employees and particularly evaluations of employees' performance are so well detailed and documented that by comparison, I find its recall procedure open to potential and, in this case, actual abuse. A connection between Ward's highly visible union activity and her delayed recall must be obvious to her coworkers, with a chilling effect on future union activity an equally obvious result. Accordingly, for all the reasons set forth above and based upon the entire record in this proceeding, I find that Respondent did not recall Linda Ward on the June 12 recall date because of her prounion activities in violation of Section 8(a)(1) and (3) of the Act.

B. *Allegations Relating to the Discharge of Employee Dianne Watkins*

Respondent stipulated that it had actual acknowledge of Dianne Watkins' activities on behalf of the UAW in late September or early October 1979.[1] Prior to early fall 1979, Watkins had received one verbal and two written warnings for poor work performance. Since those three warnings preceded the UAW campaign by substantial periods of time, they could not be attributed to nonexistent union activity. Watkins was evasive on the witness stand when confronted with documentation of these earlier warnings. She was further warned in a later written warning that disciplinary action would result if her production did not increase. She received a 3-day disciplinary suspension in October 1979. A charge was filed with the Board with respect to this suspension and a settlement was reached between the Board and Respondent. The terms of this settlement are not of record and based on other evidence, I conclude that the record of suspension remained in Watkins' personnel file. In December 1979, Watkins received an additional written warning for poor work performance.

Respondent's Exhibits 7(a) through (j) reveal the production reports of all the employees doing the same or similar work as Watkins during the same period of time. These reports clearly show that Watkins had the lowest production record in the department and, importantly, consistently remained below 100 percent in terms of production output. Watkins received a guaranteed hourly wage based on 100 percent production and greater production resulted in greater earnings. Watkins believed she worked at 40 to 50 percent of production quota rate. While her number perceptions may well have been below her actual production records, Respondent's objective exhibits show the actual results of her efforts, which were erratic. If all other employees doing the same work were able to earn bonuses then it must be assumed that either Watkins was incapable of performing the work assigned or in the alternative, was not performing to the best of her ability.

At the time of Watkins' layoff in April 1980, she was given the opportunity of bumping less senior employees doing nonproduction work. She did not take advantage of this offer because she did not believe herself capable of performing the tasks involved. At the time of her layoff, Watkins was not terminated.

Early in June 1980, Watkins contacted Angles regarding a position that she believed to be available to those people on layoff. She was informed that the position had been terminated and that it was not going to be posted for bidding within the plant. This conversation took place prior to the June 12, 1980, recall. In mid-July 1980, Watkins contacted Angles for a second time. The purpose of the call was to determine her position on the layoff seniority list. At that time, she was informed by Angles that due to her poor job performance record it had been decided that she was not going to be recalled. It is Respondent's position that a review of Watkins' record was made in the time period between the April layoff and the June 12 recall date and during that period a decision was made not to recall Watkins.

Based on Watkins' work performance, I find that Respondent had ample cause to terminate her employment. Only Watkins' union support and the timing of notice of her termination would give rise to a weak inference that the action was motivated in any respect by union animus. I cannot find that this inference is strong enough to satisfy the General Counsel's burden of proof under the test set out in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980). The evidence reflects that some nine other employees during the 1-year period preceding Watkins' termination were terminated for poor work performance, thus, Watkins' was not the only employee terminated for poor job performance. In Watkins' case, all company procedures relating to discharge were followed

[1] Watkins' prounion activities, though not insignificant, were minor compared with those of Linda Ward. As compared with Ward, Watkins could not be considered to be a leader in the Union's organizing campaign. Additionally, a substantial majority of Respondent's Russellsville employees signed authorization cards making it improbable that union animus would play a role in routine personnel decisionmaking.

and the timing of notice of discharge does not seem to have any relationship to union activity in the plant. Therefore, based on all objective evidence of record, I fully credit Respondent's explanation of why employee Watkins was discharged. Accordingly, I find that Respondent has not violated Section 8(a)(1) and (3) of the Act by either discharging Watkins or failing to recall her.

IV. THE REMEDY

Based on the foregoing findings and conclusions, I ultimately find and conclude that Respondent did engage in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by failing to recall Linda Ward on the first recall date, June 12, 1980. As I have found that Respondent has unlawfully delayed the recall of Linda Ward, I shall recommend that Respondent be ordered to make her whole for any loss of earnings she may have suffered as a result of such delay by payment to her of the amount she normally would have earned from the date of the first recall on June 12, 1980, to the date of her reinstatement on December 4, 1980, less net earnings, to which should be added interest to be computed in a manner described in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

On the basis of the above findings of fact and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. E. R. Carpenter, Co., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By delaying the recall of Linda Ward because of her union activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) of the Act.

4. Respondent did not engage in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by discharging or failing to recall Dianne Watkins.

[Recommended Order omitted from publication.]